It appears to me that part of this finding at all events is based on a misconception. It is not true that the plaintiff only raised the question of the accounts because the defendant had bought the rubber prematurely on the 30th December 1933. The plaintiff knew that he had done so, through the correspondence which had passed before the plaint was issued, but he never made this premature purchase one of his causes of action or claimed damages in respect thereof. The record makes it abundantly clear that the reason why the plaintiff made his claim in contract was because he alleged that the defendant had taken 22 pikuls and 50 catties of rubber instead of two pikuls only and that he was entitled to be paid in accordance with the prices ruling on the 19th July 1934, and on both these issues the plaintiff failed.

The question then arises whether the Court of Appeal can review the learned Judge's discretion as to costs, such discretion having been exercised on the basis of certain findings which in at least two particulars cannot be justified. Although there are differences between the provisions of the Courts Enactment and the Judicature Act, 1925, on the subject, the differences are very slight and for the purpose of interpretation the provisions may be regarded as identical. *Prima facie* therefore there can be no appeal as to costs and it has been held that if an appeal on the merits fails the order as to costs cannot be altered. Otherwise appeals would be brought nominally on the merits merely for the purpose of reopening the order as to costs. (*Harpham* v. *Shacklock*, 19 Ch. D. 207, 215). It has also been laid down by the House of Lords in *Donald Campbell & Co. Ltd.* v. *Pollak*, (1927) A.C. 732, 809 that when a judge in exercising his discretion has acted on facts connected with or leading up to the litigation the Court of Appeal is prohibited by statute from entertaining an appeal from his decision.

There are, however, cases which are outside this rule, where the judge of first instance having made a mistake upon a point of law, had no material upon which to exercise his discretion at all. One of such cases is *In re Rio Grande Do Sul Steamship Co. Ltd.*, 5 Ch. D. 282, in which the Court of Appeal allowed an appeal on a question of costs only holding that the master of a ship who held a lien was entitled as of right to all his costs of the hearing before the Vice Chancellor as costs properly incurred by a mortgagee in enforcing his security. At p. 286 Brett, J.A. says "This is a question of law, not a question about costs which are in the discretion of the judge."

Again, in *Stevens* v. *Metropolitan District Railway Co.*, 29 Ch. D. 60 the plaintiff sought a sequestration order against the Company for having infringed an injunction granted by the Court in entering upon part of the plaintiff's land. The trial judge considered that the Company had committed a breach of the injunction, but made no order except that the Company should pay the costs of the motion. The Company appealed and the Court of Appeal held that there had been no breach of the injunction and reversed the trial judge's order as to costs. At p. 73 Bowen, L.C. said "Such a case is not, I think, within Order LXV r. 1. It really is an appeal against the finding by means of which the Judge clothes himself with jurisdiction to inflict costs." In other words as there had been no breach of the injunction there was no material upon which the Judge could exercise his discretion against the defendants.

I do not think that these cases are in any way inconsistent with the rule laid down by the House of Lords in *Donald Canpbell & Co.* v. *Pollak* (*supra*) and in fact at p. 744 Viscount Cave L.J. quotes with approval the following passage from the judgment of the Privy Council in *Yeo* v. *Tatem*, L.R. 3 P.C. 696, 702 "Their Lordships do not mean to question or recede from decisions that have been pronounced regarding not allowing an appeal for costs, but where there has been a mistake upon some matter of law that governs or affects costs—some matter that involves the due application of principles of law—the party prejudiced is entitled to have the benefit of correction on appeal."

In my opinion, however, the case now before the Court cannot be brought within the exception from the general rule laid down by the House of Lords in cases where the Judge has exercised his discretion as to costs. Although for the reasons stated above I would certainly have felt inclined to exercise the discretion of the Court very differently, I find it impossible to say that there was no material upon which the learned Judge could exercise his discretion in the way he has done. Even if he had not misdirected himself upon the two points referred to above he still might have made the order which is complained of. In the circumstances I think that it is not open to the Court of Appeal to review his order. I would therefore dismiss the appeal with costs.

Appeal dismissed.

[ORIGINAL CIVIL JURISDICTION]

THOMAS, C.J. (F.M.S.)

September 16, 1935.

REFERENCE BY THE REGISTRAR OF TITLES, SELANGOR, UNDER SECTION 238 OF THE LAND CODE, 1926.

[SELANGOR CIVIL APPLICATION No. 62 of 1935]

The Civil Procedure Code, 1918, section 237, 238, 243, 265 and 275—The Land Code, 1926, sections 87 and 108—Registration of a prohibitory order against beneficial interest in land.

A prohibitory order cannot be registered in respect of the beneficial interest of a person whose name is not on the register.

H. C. Willan, Deputy Legal Adviser, for the Registrar of Titles, Selangor: Section 275, Civil Procedure Code, 1918, distinguishes between immoveable property and land. Section 108, Land Code, 1926, only deals with land or any registered interest in land, and the Registrar of Titles is only concerned with land or any registered interest in land. If unregistered interest in land can be attached what is the use of section 238, Civil Procedure Code, 1918? That a prohibitory order cannot be registered in respect of an unregistered interest is clear from *Hogg* on Registration of Titles to Land, page 354 and *Kerr* on Australian Lands Titles System, page 321.

M. Cumarasami for the attaching creditor.

Cur. Ad. Vult.

THOMAS, C.J.—This is a reference under section 238 of the Land Code by the Registrar of Titles for the State of Selangor. The question for determination is whether a prohibitory order can be registered in respect of the beneficial interest of a person whose name is not on the register.

Section 265 of the Civil Procedure Code sets out at length the property which is liable to attachment, and includes therein all other saleable property, moveable or immoveable, belonging to the judgment debtor. So there can be no question that a beneficial interest in land can be attached. But in a number of sections of the Civil Procedure Code different procedure is provided for the various kinds of property to be attached. In the case of immoveable property the attachment is made by an order prohibiting the judgment debtor from transferring or charging the property in any way. This is made under section 275 of the Civil Procedure Code, and is known as a prohibitory order. A distinction is however made in sections 237 and 238 of the Civil Procedure Code between immoveable property and land which is registered. In the former case a description of the property is required to be given, sufficient to identify it, and also a specification of the judgment debtor's shares or interest therein to the best of the belief of the applicant so far as he has been able to ascertain the same. In the latter case the application must be accompanied by an authenticated extract from the register, specifying the persons registered as proprietors of or as possessing a transferable interest in the land or as liable to pay revenue for such land, and the shares of the persons so registered. These requirements must be strictly followed; and section 243 of the Civil Procedure Code provides that where there is any defect the Court may either reject the application or order the defect to be remedied. When the application is admitted the Court shall order execution of the decree according to the nature of the application. It is obvious that it is not intended that the order for the execution of the decree shall be identical, whether the land has been registered or not. The distinction in the order prevents any confusion between the one and the other.

When a prohibitory order has been made it is necessary to comply with section 108 of the Land Code, 1926, which says:

> "No attachment by order of the Court shall affect any land or any registered interest in land until a copy of the prohibitory order under section 275 of the Civil Procedure Code, 1918, has been presented and a memorial thereof made."

The expression 'The Court' is defined in section 2 as the Supreme Court, but by section 9 of Enactment No. 22 of 1930 the expression 'The Court' is defined as meaning the Court of a Judge or the Court of a Magistrate of the First Class.

It must be remembered that the Land Code deals with the registration of land and that

> "all land which is comprised in any grant .....is subject to the Enactment and is not capable of being transferred..... except in accordance with the provisions of the Enactment."

In the first place there must be a registered title, then would come registered interests, and lastly matters affecting the registered title or interests. Once a proprietor has been registered he obtains an indefeasible title subject only to a rectification of the register. That title is of course not subject to interests which have not been registered. And if it is not subject to an interest which has not been registered, then it cannot be subject to any order or act affecting an interest which has not been registered. If it were otherwise, then the whole purpose of the Enactment would be defeated, and a proprietor might at any time be prevented from dealing with his land or interest in land owing to the existence of an order or act relating to an interest, real or imaginary, which had never been registered. Before such order or act affecting an unregistered interest could become effective it would itself have to be registered: and if it could be registered what would it affect? Surely not the title of the proprietor which is indefeasible. And similarly it could not affect any registered interest. It could only affect an interest which is unknown to the registered title.

But the register is not a means of recording anything which may happen with regard to land. This is clearly demonstrated by section 87 of the Land Code which provides that the proper registering authority shall decide whether an instrument is fit for registration. By such means the register is kept free from alien matters which do not concern the registered title.

In the course of the argument reference has been made to *Hogg's* Registration of Titles to Land, page 354, which contains the following words:—

> "In other jurisdictions (which include the Federated Malay States) the judgment or execution cannot be registered unless there is some land registered in the name of the debtor against which to register it."

Kerr on the Australian Lands Titles System has also been referred to. At page 321 is the following:—

> "It is conceived, however, that when the interest of a *cestui que trust* (not appearing on the register book) is taken in execution, no entry of a writ of execution can be made upon the title of the registered proprietor (trustee). After sale the purchaser from the Sheriff could lodge an ordinary caveat as a person beneficially entitled under a will or settlement, as the case may be."

These two references support the decision at which I have arrived independently.

The answer to the question put by the Registrar of Titles is that a prohibitory order cannot be registered in respect of the beneficial interest of a person whose name is not on the register.

Order accordingly.

[ORIGINAL CIVIL JURISDICTION]
THOMAS, C.J.
September 16, 1935.

A. S. K. SELVADURAY.....Plaintiff.

v.

MAHMOOD BIN TAWAKOL.....Defendant.

[SELANGOR CIVIL APPLICATION No. 22 of 1935]

The Land Code, 1926, section 134—Meaning of the word "Court" therein—Powers of the Court of a Magistrate under the Land Code, 1926.

The intention of the Land Code, 1926, is that it shall be administered by the Supreme Court except when it is otherwise specifically stated. Therefore the Court of a First Class Magistrate is not empowered to order the sale of immoveable property under sub-section 134(i) of the Land Code, 1926.

Plaintiff in person.

Defendant in person.

Cur. Ad. Vult.

THOMAS, C.J.—This is a reference by the Magistrate of Klang under section 586 of the Civil Procedure Code.

The statement of facts drawn up under that section shows that in a suit brought in the Klang Magistrate's Court the prayer in the plaint asked for judgment for $176 due on a promissory note, interest and costs, and also for an immediate order for the sale of land the title deeds of which had been lodged as collateral security. A caveat had previously been lodged at the Land Office, Klang, and a lien had thereby been created. Judgment was entered for the plaintiff for the sum claimed, but the learned Magistrate was not satisfied that he had the power to make the order for sale asked for, and accordingly has submitted the question for the decision of this Court.

Sub-section 134(i) of the Land Code is as follows:—

> "When a lien is intended to be created over any land the proprietor may deposit his grant, lease of State land, certificate of title or extract from the mukim register, and the person with whom the same has been deposited may present a caveat. Upon registration of the caveat the lien shall be created. When the holder of such lien has obtained a judgment of Court for the actual sum due, he shall be entitled to apply for and obtain forthwith an order for the sale of the land."

The Enactment provides no definition of the word 'Court.' There is a definition of the words 'the Court' stating that they refer to the Supreme Court. The use of the word 'Court' would therefore indicate that the judgment is not limited to one given by the Supreme Court, but would include a judgment given by a subordinate Court.

The section goes on to give a liberty to apply, but does not state to what Court the application should be made. It might of course be argued that inferentially the application should be made to the Court giving the judgment. Such an interpretation would necessitate the reading into the section after the words 'entitled to apply' some such words as 'to the Court from which the judgment has been obtained.' But the intention of the whole Enactment is that it shall be administered by the Supreme Court except when it is otherwise specifically stated. This is particularly noticeable in section 108 which relates to attachments by order of the Court, an amending section to which only extended the words 'the Court' to mean the Court of a Magistrate of the First Class (see section 5 of Enactment No. 22 of 1930). But if under section 134 the Court from which the judgment had been obtained had the power to make an order for sale, then a subordinate Court other than one of a Magistrate of the First Class would be able to make the order. In other words the powers of the Magistrates' Courts would be greater in this respect than with regard to attachments (see also section 243 of the Civil Procedure Code). Moreover, should any question arise as to the caveat, it would have to be dealt with by the Supreme Court (see Part XIII Land Code, 1926).

I conclude that in the absence of any specific statement as to what Court the application should be made, the Supreme Court is intended. The answer to the question submitted by the learned Magistrate is that the Court of a First Class Magistrate is not empowered to order the sale of immoveable property under section 134 (i) of the Land Code, 1926. The parties appeared in person and I understand that there are no costs. Accordingly I order no costs to either party.